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No. 10-344

Supreme Court, U.S.
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In The Supreme Court of the United States

ALONSO ALVINO HERRERA,
Petitioner,

v.

THE STATE OF OREGON,
Respondent.

On Petition for Writ of Certiorari to the Oregon Court of Appeals

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BRIEF OF *AMICUS CURIAE* THE FEDERAL PUBLIC DEFENDER FOR THE DISTRICT COURT OREGON IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Federal Public Defender for the District of Oregon seeks leave to file as an *amicus curiae* on the Petition for Writ of *Certiorari*, whether a criminal conviction based on a non-unanimous jury poll violates the Sixth Amendment as applied to the States through the Fourteenth Amendment.[2]

The Federal Public Defender for the District of Oregon has a twenty-five year history of active representation of petitioners in actions pursuant to 28 U.S.C. § 2254, before the United States District Court for the District of Oregon and the United States Court of Appeals for the Ninth Circuit. A significant portion of these actions involve convictions by non-unanimous jury polls, which is allowed in Oregon for all crimes save capital murder pursuant to the Constitution of the State of Oregon, Article I, Section 11 and Or. Rev.

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[1] Pursuant to Rule 37.3, counsel for *amicus* state that the parties have consented to the filing of this brief; letters of consent from the parties have been submitted to the Clerk of Court. Pursuant to Rule 37.6, counsel for *amicus* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members or its counsel made a monetary contribution to its preparation or submission.

[2] *Amicus curiae* believes that the requirement for unanimity is grounded in the right to proof beyond a reasonable doubt based in either the jury trial protections of the Sixth Amendment or the Due Process protections of the Fifth and Fourteenth Amendments. Regardless of where the right is based, it is a fundamental component of the American system of justice.

Stat. § 136.450. While many of those cases raise procedural questions not at issue here, the Federal Public Defender is aware that over the next few years numerous additional cases in which the issue has been preserved in the Oregon courts will move into federal court.

Statistics made available by the Oregon Justice Department reflect that for the calendar year of 2007, there were a total of 37,716 felony cases filed in the State of Oregon. *See* www.ojd.state.or.us./osca/-documents/2007_Stats_Table_6_001.pdf ("2007 Statistics"). The Oregon courts report a total of 30,461 felony cases were filed in 2008, and 2009 saw a total of 29,479 felony filings. *See* www.courts.oregon.gov/-OJD/docs/OSCA/2009_Stats_Table_1.pdf. Through August 27, 2010, there has been a total of 14,601 felony filings. *See* www. courts.oregon.gov/OJD/docs/-OSCA/2010_Stats_Table_1.pdf. The vast majority of criminal convictions in Oregon, as with other jurisdictions, are pursuant to a guilty plea. Available statistics indicate that just under 3% of felony cases proceed through a jury trial. *See* 2007 Statistics, *supra*. The Oregon Department of Justice recently attempted to quantify non-unanimous jury verdicts, and while not definitive the summary indicated that of the 662 trial cases surveyed, juries were polled in the 63% of the cases and just over 65% of the polls were non-unanimous on at least one count. *See* www.-oregon.gov/OPDS/docs/Reports/PDSCReportNonUnan-Juries.pdf?ga=tcases.

Even with less than 3% of all felony cases resulting in a jury trial, with up to two-thirds of the

votes being non-unanimous, there are still slightly over 2,000 individuals who have been incarcerated since 2007 based, at least in part, on such verdicts.

It has become a norm to raise and preserve the non-unanimous jury issue at the trial and appellate level pending the eventual resolution of the question by this Court. A ruling on this substantive issue will have direct impact on numerous cases pending before the states courts, and soon to be pending in the federal courts, in the district of Oregon.

STATEMENT OF THE CASE

Amicus curiae joins the statement of the case presented by counsel for Petitioner. As noted in the petition, Oregon and Louisiana are the only two jurisdictions allowing individuals to be convicted of a felony by a non-unanimous jury poll. *See* Sheri Seidman Diamond, Mary R. Rose & Beth Murphy, *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 NW. U.L. REV. 201, 203 (2006) ("jury verdicts in felony trials must be unanimous in federal courts and in all states except Louisiana and Oregon").

SUMMARY OF ARGUMENT

Depriving an individual of his liberty and freedom based on a non-unanimous jury poll is a violation of fundamental rights including the right to a trial by jury, to proof beyond a reasonable doubt, and to due process, as guaranteed in criminal trials in state courts by the Sixth and Fourteenth Amendments

to the Constitution of the United States. *Amicus curiae* joins the Petitioner's legal analysis on these issues, and as previously presented in the *amicus curiae* filing in support of the petition for writ of *certiorari* filed in *Lee v. Louisiana*, 129 S. Ct. 130 (2008) (No. 07-1536) and *Bowen v. Oregon*, 130 S. Ct. 52 (2009) (No. 08-1117).

Amicus curiae writes to address why the deprivation of an individual's liberty based on a non-unanimous jury poll is incompatible with the protections afforded by the Constitution of the United States, and particularly the rights guaranteed by the Sixth Amendment and incorporated to the States through the Fourteenth Amendment.

Based on this analysis, and that submitted by the Petitioner, *amicus curiae* joins in urging this Court to accept *certiorari* and reaffirm our constitutional guarantee that no individual may be deprived of his liberty unless the state has "suffer[ed] the modest inconvenience of submitting its accusation to 'the unanimous suffrage of twelve of his equals and neighbours'[.]" *Blakely v. Washington*, 542 U.S. 296, 313-314 (2004) (quoting 4 W. Blackstone, Commentaries on the Laws of England 343 (1769)).

ARGUMENT

I. The Sixth Amendment Analysis Set Forth In *Apodaca/Johnson* That Left Standing Convictions By Non-Unanimous Jury Polls Is Incompatible With This Court's Recent Jurisprudence.

A. The Analysis in *Apodaca/Johnson*.

In *Duncan v. Louisiana*, 391 U.S. 145, 148-149 (1968), this Court confirmed that the Sixth Amendment right to a jury trial applied to state court criminal proceedings through incorporation via the Due Process Clause of the Fourteenth Amendment. Two years later the Court was asked to consider whether a conviction based on a non-unanimous jury poll was compatible with these rights in cases in the companion cases of *Johnson v. Louisiana*, 406 U.S. 366 (1972) and *Apodaca v. Oregon*, 406 U.S. 404 (1972) (*plurality*).

The cases arose from the only two jurisdictions that allowed felony convictions by non-unanimous juries, Oregon and Louisiana, which remains true to this day. The cases bracketed the decision in *Duncan v. Louisiana*. Note, *Non-Unanimous Jury Verdicts*, 86 HARV. L. REV. 148, 148-149 (1972). Because *Johnson* pre-dated *Duncan*, that matter challenged the non-unanimity based primarily on the Fourteenth Amendment. *Apodaca* post-dated *Duncan*, and thus rested his contentions on the Sixth Amendment, arguing that unanimity under the Sixth Amendment was critical for giving meaning to the requirement for

proof beyond a reasonable doubt. As the Court explained:

> Petitioners nevertheless argue that unanimity serves other purposes constitutionally essential to the continued operation of the jury system. Their principal contention is that a Sixth Amendment 'jury trial' made mandatory on the States by virtue of the Due Process Clause of the Fourteenth Amendment, *Duncan v. Louisiana, supra*, should be held to require a unanimous jury verdict in order to give substance to the reasonable-doubt standard otherwise mandated by the Due Process Clause. See *In re Winship*, [397 U.S. 358 (1970)].

Apodaca, 406 U.S. at 411.

No majority was reached. Several justices opined that the Sixth Amendment guaranteed neither proof beyond a reasonable doubt nor a unanimous jury in any criminal case:

> Petitioners' argument that the Sixth Amendment requires jury unanimity in order to give effect to the reasonable-doubt standard thus founders on the fact that the Sixth Amendment does not require proof beyond a reasonable doubt at all.

Apodaca, 406 U.S. at 412, & 407-408 (White, J., joined by Warren, C.J., Blackmun, J., and Rehnquist, J.). Other justices believed that those guarantees had always been contained in the Sixth Amendment and must apply equally to criminal trials before any state court via the due process provisions of the Fourteenth Amendment:

> In *Duncan v. Louisiana*, [*supra*] the Court squarely held that the Sixth Amendment right to trial by jury in a federal criminal case is made wholly applicable to state criminal trials by the Fourteenth Amendment. Unless *Duncan* is to be overruled, therefore, the only relevant question here is whether the Sixth Amendment's guarantee of trial by jury embraces a guarantee that the verdict of the jury must be unanimous. The answer to that question is clearly 'yes,' as my Brother Powell has cogently demonstrated in that part of his concurring opinion that reviews almost a century of Sixth Amendment adjudication.

Apodaca, 406 U.S. at 414 (Stewart, J., joined by Brennan and Marshall, dissenting)

The plurality analysis of the Sixth Amendment rights at issue in *Apodaca* ultimately turned on whether those rights were fully incorporated to the states through the Fourteenth Amendment, or whether the Sixth Amendment rights that were

incorporated were less stringent than those mandated in federal trials. Justice Powell, writing for himself alone in a concurring opinion, concluded that the Sixth Amendment rights were not fully incorporated:

> I concur in the plurality opinion in this case insofar as it concludes that a defendant in a state court may constitutionally be convicted by less than a unanimous verdict, but I am not in accord with a major premise upon which that judgment is based. Its premise is that the concept of jury trial, as applicable to the States under the Fourteenth Amendment, must be identical in every detail to the concept required in federal courts by the Sixth Amendment. I do not think that all of the elements of jury trial within the meaning of the Sixth Amendment are necessarily embodied in or incorporated into the Due Process Clause of the Fourteenth Amendment.

Johnson, 406 U.S. at 366 (Powell, J., concurring).

Thus, the plurality analysis of the Sixth Amendment that left standing convictions by non-unanimous juries in *Apodaca/Johnson* were founded on two possible theories: that the Sixth Amendment did not require proof beyond a reasonable doubt in criminal trials, or that if required in federal criminal trials, that constitutional right was not incorporated to state court criminal trials through the Fourteenth

Amendment. Both of those theories have been rejected by this Court's recent jurisprudence.

B. This Court's Recent Jurisprudence Confirms The Right To Proof Beyond a Reasonable Doubt as a Component of the Jury Trial Guarantee.

In a series of decisions starting with *Jones v. United States*, 526 U.S. 227 (1999), this Court has analyzed the protections of the Sixth Amendment, including the questions of whether those protections guarantee the right to proof beyond a reasonable doubt of every fact alleged by the state that supports a deprivation of liberty. This Court has repeatedly and consistently answered 'yes' to that question.

In *Jones*, this Court held simply that the Sixth Amendment guarantees the right to have any fact that is an element of the offense "submitted to a jury, and proven by the Government beyond a reasonable doubt." 526 U.S. at 232.

This Court next addressed the issue in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), citing *Jones* to confirm that proof beyond a reasonable doubt in criminal trials is guaranteed both by the Due Process Clause of the Fifth Amendment and the jury trial guarantees of the Sixth Amendment:

> We [in *Jones*] noted that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees

> of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Id.*, at 243, n. 6, 119 S. Ct. 1215. The Fourteenth Amendment commands the same answer in this case involving a state statute.

Apprendi, 530 U.S. at 476.

This Court confirmed this analysis two years later in *Ring v. Arizona*, 536 U.S. 584 (2002):

> The dispositive question, we said, "is one not of form, but of effect." [*Apprendi*, 530 U.S.] at 494, 120 S. Ct. 2348. If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt

536 U.S. at 602. [3]

Two years after *Ring*, this Court revisited the issue and explicitly recognized that the requirement for proof beyond a reasonable doubt to a unanimous

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[3] In doing so, this Court overturned the prior ruling of *Walton v. Arizona*, 497 U.S. 639 (1990), noting that *Walton* was incompatible with its analysis of its Sixth Amendment rights recognized in *Apprendi*. *Ring*, 536 U.S. at 609.

jury was within the Framer's original intent for the Sixth Amendment:

> The Framers would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to "the unanimous suffrage of twelve of his equals and neighbours," 4 Blackstone, Commentaries, at 343, rather than a lone employee of the State.

Blakely, 542 U.S. at 313-14.

Three years later in *Cunningham v. California*, 549 U.S. 270 (2007), this Court confirmed that it has:

> [R]epeatedly held that, under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence.

549 U.S. at 281.

While these cases involved facts justifying a greater sentence after a defendant had been convicted either by a plea or by a unanimous jury verdict, there is no basis to distinguish the determination of guilt of any crime in the first instance.

Given the clear and consistent statements of this Court in *Jones*, *Apprendi*, *Ring*, *Blakely* and then *Cunningham*, there can be no dispute that the jury trial guarantees of the Sixth Amendment include the right to proof beyond a reasonable doubt at all criminal trials.

C. This Court's Recent Jurisprudence Rejects Any Partial Incorporation of These Sixth Amendment Rights.

As *Apprendi*, *Ring*, *Blakely*, and *Cunningham* involved state court criminal proceedings, the incorporation of these Sixth Amendment rights to such proceedings was implicit.

More recently, a majority of this Court addressed the partial incorporation theory of Justice Powell in *McDonald v. City of Chicago, Ill.*, _ U.S. _, 130 S. Ct. 3020 (2010). Noting the unusual split that was resolved by the partial incorporation analysis of a lone justice, this Court stated:

> *Apodaca*, therefore, does not undermine the well-established rule that incorporated Bill of Rights protections apply identically to the States and the Federal Government. *See Johnson*, *supra*, at 395-396, 92 S.Ct. 1620 (Brennan, J., dissenting) (footnote omitted) ("In any event, the affirmance must not obscure that the majority of the Court remains of the view that, as in the case of every specific of the Bill of Rights

> that extends to the States, the Sixth Amendment's jury trial guarantee, however it is to be construed, has identical application against both State and Federal Governments").

130 S. Ct. at 3035 n.14.

This Court's majority has consistently held that the Sixth Amendment guarantees the right to proof beyond a reasonable doubt, and has applied these rights equally to criminal proceedings in state courts. The plurality analysis of Sixth Amendment rights presented in *Apodaca / Johnson* is not reconcilable with these majority opinions, and this Court's jurisprudence should not be home to both.

II. Deprivations Of Liberty Based On Non-Unanimous Jury Polls Are Inconsistent With The Protections Of The Fifth, Sixth And Fourteenth Amendment.

A. A Trial By Jury with Proof Beyond A Reasonable Doubt Protects an Accused from Government Oppression and Unreliable Convictions.

America is unique in its recognition of a constitutionally protected right to a jury for any crime which would result in a deprivation of liberty. Leib, Ethan J., *A Comparison of Criminal Jury Rules in Democratic Countries*, 50 OHIO ST. J. CRIM. L. 629, 630 (Spring 2008) ("the United States offers the jury trial

much more broadly to criminal defendants than other countries"); Dwyer, William L., *In the Hands of The People*, at xi (St. Martin's Press 2002) ("No other modern society has bet so heavily on the common man's and woman's good sense.")

The right to a criminal trial by jury has been one of the least controversial rights guaranteed by our Constitution: the right was included in the First Continental Congress's Declaration of Rights of 1774; of the twelve states that had adopted written constitutions prior to the Constitutional Convention, the right of a criminal defendant to a jury trial was the only right universally guaranteed; and the need to safeguard the right to a trial by jury was one of the "most consistent points of agreement" between the Federalists and the Anti-Federalists" at the Constitutional Convention. Alschuler & Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 870-71 (1994). The right of an accused to a jury trial is recognized as necessary to "prevent oppression by the Government." *Duncan v. Louisiana*, 391 U.S. at 155; *see also Apprendi*, 530 U.S. at 477-78 (discussing that the jury has historically been, and is perceived by the public as being, the last bastion between the criminally accused and the power of the state) (citing *United States v. Gaudin*, 515 U.S. 506 (1995)).

While the jury stands between the accused and the government, the "beyond a reasonable doubt" standard both ensures that the jury will accurately fulfill its responsibilities when deciding the fate of an

accused and encourages respect for, and confidence in, the jury's decision:

> The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt. As we said in *Speiser v. Randall, supra*, 357 U.S. [513], at 525-526, 78 S. Ct. [1332], at 1342 [(1958)]: 'There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value – as a criminal defendant his liberty – this margin of error is reduced as to him by the process of placing on the other party the burden of * * * persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of * * * convincing the

> factfinder of his guilt.' To this end, the reasonable-doubt standard is indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue.' Dorsen & Rezneck, *In Re Gault and the Future of Juvenile Law*, 1 FAMILY LAW QUARTERLY, No. 4, pp. 1, 26 (1967).
>
> Moreover, use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.

In re Winship, 397 U.S. at 363-364.

The questions becomes whether the jury can fulfill its fundamental functions when the opinion of a significant percentage of its members – 16% – is deemed to be irrelevant.

B. A Lack of Unanimity Fundamentally Alters Jury Deliberation in a Manner that Undermines the Constitutionally Mandated Role of the Jury.

The lack of a unanimity requirements fundamentally impacts the conduct of a jury; empirical evidence documents that failing to require unanimity negatively affects the jury's deliberation process and the accuracy of its fact findings.

Studies of mock juries who were told they did not have to reach unanimity documented that the juries were less concerned about deliberation and more focused on getting to a verdict; such juries refused to consider the merits of the minority view, they were likely to take the first formal ballot within ten minutes of being seated as a jury and to continue to vote until they reached a verdict by the required number. *Revisiting the Unanimity Requirement*, 100 NW. U. L. REV. at 208. In marked contrast, the juries who were told they had to reach a unanimous verdict delayed their vote until after they had discussed the evidence and rated their deliberations as both more serious and more thorough. *Id.* Other studies document that when unanimity is not required, the opinions of individual jurors are disenfranchised – and members of a minority or women are the most likely to be disenfranchised. Taylor-Thompson, Kim, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1285-87, 1299-1301 (April 2000).

The lack of deliberation has a direct impact on the quality of the verdict. A lack of deliberation can negatively impact the verdict's accuracy. In one study, individuals called for jury duty were instead asked to sit as mock jurors, and viewed a video of a trial of a case that was intentionally designed by experts not to be sufficient as first degree murder, but instead of a lesser charger. Of the juries that had to deliberate until they reached unanimity, not one jury could reach a unanimous vote of first degree murder; of the juries that were allowed to reach a majority vote, 12% returned a verdict of first degree. *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. at 1273. In short, the juries that had to be unanimous more accurately analyzed the evidence, those that did not have to be unanimous were less likely to do so.

The lack of deliberation also impacts the perception of the jury's role. Juries that are unanimous report great satisfaction and confidence in their verdicts. *Revisiting the Unanimity Requirement*, 100 NW. U. L. REV. at 208. In contrast, the failure to consider all of the opinions on a jury "could undermine public confidence in the fairness of the verdicts." *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. at 1314.

C. There is No Justification for Allowing a Lack of Unanimity in Criminal Juries.

A primary reason for allowing non-unanimous juries is a contention that those who vote "not guilty" are unreasonable, hold-out, jurors simply seeking to

cause a hung verdict. *See* Morehead, Jere W., *A "Modest" Proposal for Jury Reform: The Elimination of Required Unanimous Jury Verdicts*, 46 U. KAN. L. REV. 933, 935 (1998); Comment, *Letting the Supermajority Rule: Nonunanimous Jury Verdicts in Criminal Trials*, 24 FLA. ST. U. L. REV. 659, 675 (1997); Note, *Jury Unanimity in California: Should it Stay or Should it Go?*, 29 LOY. L.A. L. REV. 1319, 1347 (1996).

If such a concern was true, however, one would expect a plethora of hung-juries in every jurisdiction that requires unanimity. There is no reason to believe that the individuals called to state jury service in Oregon are more unreasonable than those jurors called to serve in federal courts in the same jurisdiction, or into every other court in the nation both state and federal. As Oregon has about one-third to one-half of all felony trials decided by non-unanimous jury votes, logically one would expect that one-third to one-half of every criminal case in jurisdictions requiring unanimity to suffer hung juries. In reality, hung juries are rare in all jurisdictions, with analysis finding only 2% of federal trials, and between 4% and 6% of state trials, ending in such verdicts. Reichelt, Jason D., *Standing Alone: Conformity, Coercion, and the Protection of the Holdout Juror*, 40 U. MICH. J.L. REFORM 569, 582-83 (Spring 2007); *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. at 1287 n.150.

An analysis undertaken through the National Center for State Courts via a grant from the Department of Justice, found that less than 4.8% of federal trials between 1980 and 1997, and an average of 6.2% of state trials between 1996 and 1997, ended in

hung juries. *Are Hung Juries a Problem?* at 19-25.[4] While the authors of the research project considered utilizing non-unanimous juries as a solution, the recommendations rejected that option as not addressing the real problems causing hung juries – which was not unreasonable hold-out jurors:

> But it is also clear from this study that such an approach would address the symptoms of disagreement among jurors without necessarily addressing the actual causes – namely, weak evidence, poor interpersonal dynamics during deliberations, and jurors' concerns about the appropriateness of legal enforcement in particular cases. Moreover, there is empirical support that the introduction of a non-unanimous verdict rule might also affect the jury's deliberation process in unintended ways such as cutting off minority viewpoints before the jury has an opportunity to consider those opinions thoroughly. Solutions that focus specifically on the underlying causes of juror deadlock, rather than on its effects, may prove to be more effective in the long run. Possible remedies include better case selection and preparation by attorneys; better tools for jurors to understand the evidence and law; and

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[4] Available at: www.ncsconline.org/WC/Publications/Res_-Juries_HungJuriesProblemPub.pdf.

> guidance for jurors about how to conduct deliberations.

Id. at 86.

Frequently when a jury is unable to resolve a case, it is because they jury started out significantly divided in their view of the case – not because of a lone, irrational, dissenter. *Standing Alone*, 40 U. MICH. L.J. REFORM at 570-71 (*citing* Denise J. Devine *et al.*, *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL. PUB. POL'Y & L. 622, 690-707 (2001). Other empirical research confirms that, far from been unreasonable, hold-out jurists in both non-unanimous civil juries and mock criminal trial juries frequently took the same position as taken by the judges who heard the case. *Revisiting the Unanimity Requirement*, 100 NW. U. L. REV. at 229-230. Allowing non-unanimous verdicts does not solve the non-existent problem of unreasonable hold-out jurists, and cannot be justified on that basis.

Another justification cited for allowing non-unanimous juries is that majority vote is quite common in democracy – it is utilized in elections, legislative, and even in appellate judicial proceedings. *See* Amar, Akhil Reed, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1189-90 (1995). Why, then, would it not be reasonable for juries as well? Yet legislatures and judiciaries make prospective laws that bind everyone subject to that law – including the members of the legislature and the judiciary themselves. If the same or a different

legislature, or a different judicial panel, decides that the prior law was inappropriate or somehow mistaken, they can always rectify their action by a new enactment. At no point is a legislature or judicial panel obligated to determine that their enactment is appropriate beyond a reasonable doubt – and few laws could be passed or decisions reached if that was the standard. In marked contrast, the decision of a criminal jury impacts not them, but the defendant, and it cannot be revisited if the same jurors later doubt their decision. Further, the decisions controls the most fundamental interests guaranteed by our constitution – life and liberty. The standard of beyond a reasonable doubt is required to protect these fundamental interests, and a majority rule is simply not compatible with that standard. *See* Primus, Richard A., *When Democracy is Not Self-Government: Toward a Defense of the Unanimity Rule for Criminal Juries*, 18 CARDOZO L. REV. 1417 (January, 1997).

D. The Doubts of 16% of a Properly Empaneled Jury Cannot Be Dismissed as Necessarily and Always Unreasonable.

Criminal juries are selected from lists of qualified individuals who make up a venire. These individuals are then questioned to discern any bias or other basis to remove them for cause, and only after each side has exercised its peremptory challenges is the petit panel duly sworn to impartially consider the evidence and apply the law. After hearing all the evidence and instructions, the panel retires to deliberate and reach a verdict. In Oregon and

Louisiana, however, the opinions of 16% of these well qualified jurors are frequently ignored.

For such a conviction to pass constitutional muster under the Sixth and Fourteenth Amendments, this Court must determine that the doubts of these 16% of the jury are necessarily, and always, unreasonable. Neither history, logic, nor empirical research, supports such a determination. As Justice Marshall wrote in dissent, joined by Justice Brennan, in *Apodaca/Johnson*:

> The doubts of a single juror are in my view evidence that the government has failed to carry its burden of proving guilt beyond a reasonable doubt.

406 U.S. at 403.

A common joke among Oregon's defense bar is that if the classic *Twelve Angry Men* had been filmed here, it would have been a very short film indeed. This Court has rightly refused to apportion a mathematical number for the "beyond a reasonable doubt" standard of proof. *See, e.g., Holland v. United States*, 348 U.S. 121 (1955). Yet that is what Oregon and Louisiana are *de facto* doing, they are setting "beyond a reasonable doubt" as the conclusion of 84% of the jury.

There is simply no support, either in empirical research or at common law, to believe that the doubts of 16% of a properly constituted petit jury panel are always unreasonable. Convictions based on a jury poll which is not unanimous are convictions attained based

on a level of proof lower than beyond a reasonable doubt, and are therefore in violation of the guarantees provided by the Sixth and Fourteenth Amendments.

CONCLUSION

For the reasons presented herein, *amicus curiae* joins with petitioner in asking this Court to accept *certiorari* on the first question, and determine whether the practice of depriving an individual of their liberty based on a non-unanimous jury poll is in violation of the protections afforded to an accused by the Sixth and Fourteenth Amendments.

Respectfully submitted,

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